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IN THE

Supreme Court of the United States

October Term, 1941.

No. 838

GEORGE T. GOGGIN, as Trustee in Bankruptcy of the Estate of Acme Traffic Signal Company, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

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GEORGE T. GOGGIN, as Trustee in Bankruptcy of the Estate of Acme Traffic Signal Company, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan P. Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petition of George T. Goggin respectfully shows to this Honorable Court:

I.

Summary Statement of Facts.

The facts in this case are:

Acme Traffic Signal Company was a California corporation. Originally it instituted and prosecuted proceedings in the United States District Court for the Southern District of California for reorganization under Chapter X

of the Bankruptcy Act. Failing in reorganization, the corporation was adjudged a bankrupt in the same proceeding on May 13, 1940, and the case referred to a Referee in Bankruptcy for administration. Upon the Trustee's refusal to sign a return prepared by the Collector of Internal Revenue for the capital stock tax for the fiscal year ending June 30, 1940, the Collector, under authority of Section 3612 of the Internal Revenue Code, made the return. In it the Collector started with the adjusted declared value of $198,412.46, reported in the company's 1939 capital stock tax return made by the officers of the bankrupt corporation prior to the filing by the company of its proceeding under Chapter X. From this amount $13,446.20 was deducted as the amount of loss occurring during the previous income tax year according to the taxpayer's books. Thus an adjusted declared value of $184,-966.26 was arrived at for the fiscal year ending June 30, 1940. A capital stock tax of $184.00 was computed and assessed for such fiscal year ending June 30, 1940. But, since Section 204 of the Revenue Act of 1940, enacted after the preparation and filing of the Federal Government's capital stock tax claim in the bankruptcy proceeding, provided for an increase in the amount of the tax by 10%, the total tax for which claim was finally made was $202.00. It is conceded that the capital stock of the bankrupt had an actual fair market value at less than $184,000 on June 30, 1940, and that the Trustee in Bankruptcy was able to obtain only $5100 from the sale of all of the bankrupt's assets.

The Referee in Bankruptcy, over the objections of the Trustee in Bankruptcy, allowed the tax claim. Upon review the order of the Referee was reversed by the Judge of the District Court. Upon appeal by the Federal Government from this judgment of the District Court the Circuit Court of Appeals for the Ninth Circuit, by its judgment made November 18, 1941, reversed it. No petition for rehearing has been filed or is pending in the Circuit Court of Appeals. The claim thus stands allowed at $202.00.

The Referee did not state his reasons for his decision. The opinion of the District Court is reported in 37 Fed. Supp. 352, 45 A. B. R. (N. S.) 346, and is a part of the record before the Supreme Court [Tr. p. 2]. The opinion of the Circuit Court of Appeals is likewise of record [Tr. p. 40].

The theory of the District Judge was that the Bankruptcy Court had full power, under Sections 62-a and 64-a of the National Bankruptcy Act of 1898, as amended by the Chandler Act, to hear and determine whether the value which formed the basis of the assessment for the computed capital stock tax was a proper and correct value, as provided by Section 1200-(a) *et seq.* of the Internal Revenue Code.

Section 62-a of the Bankruptcy Act provides:

> "Sec. 62a. The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath,

and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

Since the period for which the Federal Government claims the taxes due is partly before the bankruptcy, viz., up to May 13, 1940, and partly afterwards, viz., May 13 to June 30, 1940, Section 62-a may have some application here. Taxes accruing after the commencement of bankruptcy proceedings are expenses of administration of the bankrupt estate on a parity with other expenses.

Missouri v. Earhart, 111 Fed. (2d) 992, 42 A. B. R. (N. S.) 634;

In re Cal. Pea Products (D. C. S. D. Cal.), 37 Fed. Supp. 658, 45 A. B. R. (N. S.) 393;

In re Lambertville Rubber Co. (C. C. A. 3), 111 Fed. (2d) 45, 42 A. B. R. (N. S.) 697;

In re Columbia Ribbon Co. (C. C. A. 3), 117 Fed. (2d) 999, 45 A. B. R. (N. S.) 528.

Section 64-a-(4) of the Bankruptcy Act provides:

". . . in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court (court of bankruptcy);"

As stated by the District Judge in his opinion:

"Whether the determination of the question under consideration is under Section 64-a-(4) or under Section 62 of the Bankruptcy Act, as an expense of

administration, the power of the Bankruptcy Court to decide the matter is co-extensive in either situation."

The theory of the Circuit Court of Appeals, in its opinion, is that the plain import of the Revenue Act and the Treasury Regulations is that the capital stock tax for the fiscal year ending June 30, 1940, was a tax levied as against the corporation for the privilege of carrying on and doing business for the whole or any part of such fiscal year and that, since the corporation did carry on and did do business throughout that fiscal year and up until the adjudication of bankruptcy May 13, 1940, such capital stock tax had, in fact, accrued and the bankruptcy could not work any change in the method of its ascertainment or of the amount of the tax. And, further, that the tax was an indebtedness of the corporation the same as any obligation owed by it at the time of the bankruptcy proceedings and must be so treated.

II.

Issue Involved.

The issue involved in this case is as follows:

Should the capital stock tax due from the bankrupt corporation for the taxable fiscal year ending June 30, 1940, be determined on the basis of the adjusted declared value of the capital stock as determined by the Collector of Internal Revenue under the applicable revenue act, or on the basis of the actual value of the assets of the bankrupt corporation during the period involved.

III.

Reasons Relied on for the Allowance of the Writ.

1. **Necessity of a Clarification of the Application of the Recent Decision of the United States Supreme Court in the Case of Arkansas Corporation Commission v. Thompson.**

An uncertainty now exists in Bankruptcy Courts, owing to the language of the Court in the opinion in the recent decision of the United States Supreme Court in the case of *Arkansas Corporation Commission v. Thompson*, decided April 28, 1941, 85 L. Ed. Adv. Op. 801, as to (a) the power of Bankruptcy Courts to determine, under Section 64-a-2 of the Bankruptcy Act, as amended by the Chandler Act, the legality and amount of tax claims filed against bankrupt estates and accruing prior to the commencement of the bankruptcy proceeding, and (b) the power of the Bankruptcy Court to determine, under Section 62-a of the Bankruptcy Act, as amended by the Chandler Act, the legality and amount of tax claims presented against bankrupt estates as expenses of administration. A serious question has arisen as to whether the Bankruptcy Court can go behind the determination of a taxing agency as to the amount of the tax and itself fix the proper amount after reviewing the facts. The tax involved in that case was one arising after the commencement of the bankruptcy, *i. e.*, an expense of administration and, therefore, subject to Section 62-a and not Section 64-a-(4). The bankruptcy was a railroad reorganization under Section 77. The Court expressly declined to decide whether Section 64-a-(4) applied to proceedings under Section 77. The decision of the Court, so far as it is confined to the facts of the case, appears to be based upon sound principles, since the trustee, with the consent of

the Bankruptcy Court, submitted himself to the jurisdiction of the Arkansas Corporation Commission for the determination of the tax after a hearing. He was bound by its decision upon the doctrine of *res judicata.*

But the difficulty is that the Court, in the latter part of its opinion, probably by way of *obiter dicta*, uses language indicating that the Bankruptcy Court does not have power to determine the amount of the tax where the same has been fixed by a taxing agency, even though the basis of the tax is false or the tax itself is based upon an excessive assessment. The Court states:

> "But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as super-assessment tribunals over state taxing agencies. The express legislative purpose of Arkansas to move towards a more nearly uniform and fairly distributed tax burden through relying on supervision by a single agency could be in large part frustrated by the construction of the Bankruptcy Act for which the trustee here contends. Section 64-a, thus construed, would tend to obstruct, and not to facilitate, the enforcement of the state tax laws. Nothing in the language of the Act requires such a construction. And the policy of revising and redetermining state tax valuations contended for by the trustee would be a complete reversal of our historic national policy of federal non-interference with the taxing power of the states."

As a result of the decision tax assessors all over the country are contending that they are quasi-judicial agencies because, in fixing assessments, they have the power to gather evidence and hold hearings and, therefore, their determinations, even though the bankrupt or the trustee take no part therein, are binding upon the Bankruptcy Court.

Judge Harry A. Hollzer of the United States District Court for the Southern District of California, Central Division, in the unreported case of *In re Santa Fe Distilleries,* No. 32,667-H in Bankruptcy, has held that, in view of such decision, the Bankruptcy Court does not have power to review and revise tax assessments, at least with respect to those made by state taxing agencies.

It would seem that the determination of a tax by a taxing agency would not have any greater force than a judgment of a court of competent jurisdiction. In the case of *Pepper v. Litton,* 308 U. S. 295, 84 L. Ed. 281, 41 A. B. R. (N. S.) 279, the Supreme Court held that the Bankruptcy Court, at least where *res judicata* is not involved, could go behind the underlying debt to ascertain whether the judgment was just or not.

The real theory of the Arkansas case, as we see it, is that the trustee, by undertaking to challenge the assessment before the Corporation Commission and by failing to appeal therefrom as provided by law, was estopped to challenge the result in the Bankruptcy Court.

Collier on Bankruptcy, 14th Ed., Vol. 3, p. 2166, Note. 60.

2. Conflict of the Decision of the Ninth Circuit With the Decisions of Other Circuit Courts of Appeals.

If we assume that the decision of the Supreme Court in the *Arkansas Corporation Commission v. Thompson* case does not go so far as to deprive the Bankruptcy Courts of the power to determine the proper amounts of tax claims, whether fixed by state or federal taxing agencies, at least in the absence of a plea of *res judicata,* then we run into a conflict between the decisions of the Ninth Circuit in this case and the decisions of other Circuit Courts of Appeals wherein it is held that the Bankruptcy Courts have full power to revise the amount of any such tax claims.

See:

Henderson County v. Wilkins (C. C. A. 4), 43 Fed. (2d) 610, 16 A. B. R. (N. S.) 359;

Dickinson v. Riley (C. C. A. 8), 32 A. B. R. (N. S.) 279;

City of Springfield v. Hotel Charles Co. (C. C. A. 1), 31 A. B. R. (N. S.) 604, 84 Fed. (2d) 589.

It appears that the Seventh Circuit, in the case of *In re 168 Adams Building Corp.,* 40 A. B. R. (N. S.) 754, 105 Fed. (2d) 704, supports the decision of the Ninth Circuit in our particular case. The Ninth Circuit itself, in the previous case of *In re Florence Commercial Co.,* 19 Fed. (2d) 468, 10 A. B. R. 284, indicated, while not directly deciding, that in its opinion the Bankruptcy Court did have jurisdiction to review the amount of tax claims.

3. The Circuit Court of Appeals for the Ninth Circuit Has Decided an Important Question of Federal Bankruptcy Law Which Has Not Been, but Should be, Finally Settled by the Supreme Court of the United States.

That this is the situation is exemplified by the comments of Professor James Wm. Moore, editor-in-chief of the new *Collier on Bankruptcy*, 14th edition, volume 3, pages 2143 *et seq.*, wherein he discusses the case of *Arkansas Corporation Commission v. Thompson*, decided April 28, 1941, 85 L. Ed. Adv. Op. 801. The facts in that case were: The Arkansas Corporation Commission is a state agency, vested with authority in the regulation of certain public utilities, including railroads. Also, in the administration of the state tax laws, the Commission has supervision over the valuation, assessment and equalization of all property. It has power to summon witnesses and hear evidence. Before assessments are finally determined all persons interested have the right, on written application, to appear and be heard. In 1939 the Missouri Pacific Railroad was being operated in Arkansas by a trustee in Section 77 proceedings under the Bankruptcy Act. The Commission, after a hearing in which the trustee participated, fixed the value of the railroad's Arkansas property and levied an assessment for 1939. The trustee's motion for rehearing was heard, considered and overruled by the Commission. The trustee did not appeal to the state courts, as he had a right to do, from these decisions of the Commission. The trustee then sought to have the Bankruptcy Court fix the validity and amount of this assessment. While the lower federal courts held that this could be done, the Supreme Court held it could

not. Professor Moore states: Until the decision of the United States Supreme Court in *Arkansas Corporation Commission v. Thompson* the great weight of authority was that the Bankruptcy Court had full power to examine into the validity and *amount* of taxes constituting the basis for prior claims in bankruptcy and to ascertain from the evidence presented the legality of the tax and the amount of the valuation which should be used as the basis for the assessment. He further states that it was a generally-accepted view that even a determination, after hearing, by a duly constituted state tax board agency was not conclusive as to the Bankruptcy Court, although it was held that, with respect to federal taxes, a determination by the Board of Tax Appeals could not be controverted. Also that it was the preponderate weight of authority that an assessment by and under the authority of a tax collector or assessor, a Collector of Internal Revenue, or the Commissioner of Internal Revenue, was subject to redetermination by the Bankruptcy Court. Professor Moore further states that it now appears settled, in view of the Arkansas case, that where a duly constituted *quasi*-judicial agency, state or federal, has passed upon a tax claim by due hearing thereon, the Bankruptcy Court cannot redetermine such claim or alter its amount unless (a) the agency has made an improper arithmetical computation, or (b) has acted beyond its legal powers, or (c) the assessment has been tainted by discernible illegality under the applicable tax law as distinguished from a mere alleged over-assessment based on an assessed value. Further than this he states light is needed. There is not in

the Arkansas case any solution of the problem as to whether or not the trustee is concluded by the acts or omissions of the bankrupt where a *quasi*-judicial agency has not passed upon the tax claim. Under the view contended for in the cases of *In re Gould Mfg. Co.* (D. C. Wis.), 29 A. B. R. (N. S.) 733, 11 Fed. Supp. 644; *In re 168 Adams Building Corp.* (D. C. Ill.), 40 A. B. A. (N. S.) 444, 27 Fed. Supp. 247, affirmed (C. C. A. 7) 40 A. B. R. (N. S.) 754, 105 Fed. (2d) 704, and companion cases, that an assessment by a tax assessor or similarly empowered officer would be in the same category as that made by a *quasi*-judicial taxing agency, it might be argued that, inferentially, the Arkansas case supports this view, since those cases are cited therein with apparent approval. On the other hand, credence is given to the opposite conclusion in that the court, in distinguishing the previous Supreme Court case of *State of New Jersey v. Anderson*, 203 U. S. 483, 17 A. B. R. 63, 51 L. Ed. 284, stressed the fact that the state board there acted in an administerial capacity rather than a *quasi*-judicial one. Professor Moore concludes his dissertation on the subject at page 2167, where he states that until the point has been squarely decided by the Supreme Court he feels that the weight of authority still prevails that the bankruptcy estate may obtain a revaluation where the assessment is clearly shown to be grossly excessive and the assessment has not progressed beyond the stage where a tax assessor or some similar officer, not acting in a *quasi*-judicial capacity, has made the determination.

4. The Effect of the Decision of the Ninth Circuit Is to so Cloud the Question of the Power of the Bankruptcy Court, Under Both Section 64-2-(4) and Section 62-a of the Bankruptcy Act, to Determine the Amount and Legality of Tax Claims, Particularly Where They Are Upon a False Basis or Are Based Upon an Excessive Assessment, That an Authoritative Decision of the Supreme Court Is Required to Clarify the Law, Not Only for the Benefit of Taxpayers Throughout the Nation but Also for the Benefit of State and Federal Governments Themselves.

With mounting taxation all over the country, state and federal, bankrupt estates are easy prey for the ready collection of tax money. Sometimes bankrupt estates have to contend with about a dozen different kinds of taxes. The smaller estates are usually so overwhelmed with taxes as prior debts that they are entirely swallowed up before there is even a nibble left for the general creditors.

The time has arrived, in the interest alike of debtors, bankrupts, creditors, trustees in bankruptcy and taxing agencies, both state and federal, for a clarification, as far as is possible, in view of the existing laws and cases, of the power of Bankruptcy Courts to determine the legality and, particularly, the *amount* of tax claims with respect to the following situations:

(a) Where the debtor or bankrupt, prior to bankruptcy, fails to avail himself of the methods provided by state or federal laws for the review of tax assessments which are false or excessive.

(b) Where the debtor or bankrupt, prior to bankruptcy, avails himself of such methods to the extent that

the final determination by the state or federal taxing authority, whether *quasi*-judicial or not, is *res judicata* as to him, but not as to creditors or his subsequent trustee in bankruptcy.

(c) Where the trustee in bankruptcy fails to avail himself of the methods provided by state or federal laws for the review of false and excessive assessments made before bankruptcy for taxes accruing prior to that time, and awaits the filing of the tax claim against the bankrupt estate and then invokes Section 64-a-(4), which appears to give the Bankruptcy Court the power to determine the legality and amount of such taxes.

(d) Where the trustee in bankruptcy, with respect to taxes accruing after bankruptcy, as expenses of administration, fails to avail himself of such methods, and awaits the presentation of the tax claim to the Court for payment and then invokes Section 62-a, which gives the Bankruptcy Court the power to fix and determine expenses of administration.

The instant case furnishes an excellent vehicle for this purpose.

IV.

Brief in Support of This Petition.

Attached to this petition, and as a part of the same, is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the said Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein, a full and complete transcript of the record and all proceedings in the case numbered 9805 in that Court and entitled "United States of America, Appellant, vs. George T. Goggin, as Trustee in Bankruptcy of the Estate of Acme Traffic Signal Company, a corporation, bankrupt, Appellee," and that its judgment therein made on November 18, 1941, may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, this 18th day of December, 1941.

GEORGE T. GOGGIN,
Trustee in Bankruptcy of the Estate of Acme Traffic Signal Company, a Corporation, Petitioner,

By REUBEN G. HUNT,
His Counsel.

ROBERT B. POWELL,
GRAINGER & HUNT,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 18th day of December, 1941.

REUBEN G. HUNT,
Counsel for Petitioner.